Supreme Court, U.S.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PERRIN W. HURDLE

Petitioner,

versus

SEARS, ROEBUCK AND COMPANY

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

IS FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, VIOLATED BY THE FIFTH CIRCUIT COURT OF APPEALS APPLICATION OF 29 U.S.C.A. SECTION 626(f) IN A MANNER WHICH RESULTS IN CLAIMS OF COVERED EMPLOYEES BEING DENIED, WHILE OTHER CIRCUITS EXTEND PROTECTION UNDER THE SAME STATUTE TO PERSONS SIMILIARLY SITUATED, WITH THE SAME OR SIMILAR FACTS AS PETITIONER?

PARTIES

The Petitioner is:

Perrin W. Hurdle

The Respondent is:

Sears, Roebuck & Company

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REFERENCE TO OFFICIAL REPORTS OF OPINIONS BELOW

The judgment sought to be reviewed was entered in the Fifth Circuit Court of Appeals and entitled:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 96-60321

PERRIN W. HURDLE

VERSUS

SEARS, ROEBUCK AND COMPANY

The judgment reviewed by the United States District Court, for the Southern District of Mississippi, Southern Division, and was entered on the 12th day of April, 1996, and entitled:

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

NO. 1:95cv247-Br-R

PERRIN W. HURDLE, Plaintiff

VERSUS

SEARS, ROEBUCK AND COMPANY, Defendant

The opinion of the Fifth Circuit Court of Appeals is in the Appendix at (A-1).

JURISDICTION

The judgment for which review is sought was entered April 15, 1997. The judgment for which review is sought is a final judgment of the Appeals Court where review could be sought from a judgment entered by the Federal District Court, and where the judgment turns upon substantial federal questions. Jurisdiction of the United States Supreme Court is pursuant to 28 United States Code, Section 1257.

The federal questions involved arise out of the interpretation and application of 29 U.S.C. 626(f), the Older Workers Protection Act (OWBPA) and a denial of due process and equal protection under the law in the application of 29 U.S.C. 626(f) by the Fifth Circuit Court of Appeals in violation of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

FOURTEENTH AMENDMENT

Section 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

29 United States Code, Section 626(f):

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights to claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the document;

(F) ... (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate,

as to - (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and, (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

STATEMENT OF THE CASE

In July, 1993, the Plaintiff, Perrin W. Hurdle was employed by the Defendant Sears, Roebuck & Company (Sears) in a management position from which he was laid off. Prior to this he had worked continuously for Sears for a period of 26 years in its Biloxi, Mississippi store. On July 20, 1993, Mr. Hurdle was called into the store on his day off, by the store manager, Rick Wickboldt, and informed that he was no longer needed at Sears and that he was being laid off immediately. (A 8) This meeting lasted approximately 25 minutes at the most (A 9), and was probably shorter in duration. During the meeting Mr. Hurdle was asked to execute a General Waiver which included a waiver of an age discrimination claim in order to receive a severance package. Rick Wickboldt stated that he understood executing the waiver was necessary to get the severance package and also that it was necessary to get extra severance pay. This was the first waiver that Wickboldt had actually done with an employee.

Mr. Hurdle was taken by surprise by the content of the

meeting with Wickboldt and the news of the lay-off. On the day he was presented with the Waiver, Hurdle did not really comprehend what the Waiver said and/or did. (A 8,9) Additionally, he stated that Rick Wickboldt informed him that the execution of the waiver was only a formality. (A 8) Following this meeting, and within the seven (7) days provided for in the waiver, Mr. Hurdle took steps to attempt to revoke the waiver. (A 9)

Sears, Roebuck filed for summary judgment on the basis that the Hurdle had ratified the Waiver which Wickboldt gave him to sign.

The U.S. District Court felt that a issues of fact existed as to the execution of the waiver presented to Hurdle by Sears. However, the Court found that a ratification of the waiver would negate any waiver deficiencies, as the Fifth Circuit had previously so held. (A 13)

ARGUMENT

IS FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, VIOLATED BY THE FIFTH CIRCUIT COURT OF APPEALS APPLICATION OF 29 U.S.C.A. SECTION 626(f) IN A MANNER WHICH RESULTS IN CLAIMS OF COVERED EMPLOYEES BEING DENIED, WHILE OTHER CIRCUITS EXTEND PROTECTION UNDER THE SAME STATUTE TO PERSONS SIMILARLY SITUATED, WITH THE SAME OR SIMILAR FACTS AS PETITIONER?

In 1990, Congress passed the Older Workers Protection Act (OWBPA), Public Law 101-433, as an amendment to the ADEA which added subsection (f) to 29 U.S.C.A. Sec. 626.

Subsection (f) Waiver lists specific requirements that must be met in order for a waiver to be considered "knowing and voluntary":

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual does not waive rights to claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the document;

(F) ... (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to - (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and, (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

The different federal courts of appeals have applied the language of 29 U.S.C.A. Sec. 626(f) in two fundamentally different ways. The Fifth Circuit and the Fourth Circuit have -

held that an otherwise invalid release and waiver can be ratified. While the Seventh Circuit, Eleventh Circuit, and the court of appeals in Massachusetts (First Circuit) have found that if the release and waiver is invalid it cannot be ratified by the employee.

DUE PROCESS AND EQUAL PROTECTION

Prior to the passage of the OWBPA, Congress passed amendments to the ADEA in an effort to resolve conflicts that had arisen among the federal courts of appeals in their respective interpretation of the same provision of the Act. S. Rep. No. 101-263, 101st Cong., 2d Sess. 5, *reprinted in* 1990 U.S. Code Cong. & AD. News 1509 at 1513

In reviewing the provisions of the OWBPA, the language of Section 626(f) is clear.

> When the plain text of a statute is clear then 'courts must presume that a legislature says in a statute what it means and means in a statute what it says. When the words of a statute are unambiguous, then, this first cannon is also the last: 'judicial inquiry is complete.'

Oberg v. Allied Van Lines, Inc., 11 F.3d 679 at 683 (7th Cir. 1993) citing to Connecticut Nat. Bank v. Germain, 503 U.S. 249,

112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992), *citations omitted*

The case at hand highlights the problem which occurs when the OWBPA, or any federal statute, is applied to different persons in the same factual scenario when the outcome is solely dependent upon one's geographical location. It is a denial of one's fundamental rights of Due Process and Equal Protection under the law, granted to each citizen in the Fourteenth Amendment to the United States Constitution, to differ the application of the same provision of a statute to different persons who share the same fact scenario.

For example, in Collins v. Outboard Marine Corp., 808 F.Supp 590 (N.D.Ill 1992) the court of appeals found that the release and waiver agreement executed by the parties did not meet the OWBPA waiver requirements. The court further found "that a release cannot be deemed knowing and voluntary unless all of the technical requirements of the OWBPA have first been satisfied. Therefore, the release is invalid as to plaintiff's ADEA claim." 808 F.Supp at 594 In addition, if there is no valid waiver, than there can be no ratification.

In Oberg v. Allied Van Lines, 11 F.3d 679 (7th Cir. 1993), the Seventh Circuit found that the waivers executed by the plaintiffs did not include either Section 626(f) subsections (1)(F) or (1)(H). Therefore, the plaintiffs could not have knowingly and voluntarily waived any claims or rights under the ADEA. The court held that the waivers were invalid, and therefore, could not be ratified.

In the above Circuits, if the release and waiver does not comply with the provisions of the OWBPA, and/or, is not knowing and voluntary, then it is invalid, and the employee may pursue his claim.

However, the opposite is result is seen in Wamsley v. Champlin Refining & Chemicals, Inc., 11 F.3d 534 (5th Cir. 1993) which held that Sec. 626(f) merely makes the waiver voidable at the employee's election. In Wamsley, supra. the appellants denied that they had received the 45 days required under the statute in which to consider the waiver; the appellees stated otherwise. The Fifth Circuit clearly stated that this was a fact issue which could not be resolved via summary judgment.

Notwithstanding this the court went on to address the issue of ratification. The end result was that the appellants in Wamsley were found to have ratified the release and were denied the pursuit of their claim.

The Fifth Circuit position has either interjected an additional provision into Section 626(f) by stating that an invalid waiver can be ratified, or, at a minimum somehow extracted this provision from one of the subparts of Section 626(f).

The different Circuit cases represent the differing and inconsistent application of the same OWBPA provision to different persons in the same factual setting. In the case at hand, if the same events had happened to Hurdle in the State of Illinois, rather than, the State of Mississippi, the release would have been held to be invalid by the district court and he would be allowed to pursue his claim. Hurdle is therefore being denied his fundamental rights to due process and equal protection under the law merely because the Release was executed in Mississippi rather than Illinois.

LEGISLATIVE HISTORY

The Majority report of the Congressional Committee for the Older Workers Protection Act, Public Law 101-433, contains valuable insight as to the intent of the framers of the Act. For instance, the "Committee intend[ed] that the requirements of title II be strictly interpreted to protect those individuals covered by the Act." S. Rep. No. 101-263, 101st Cong., 2d Sess. 5, *reprinted in* 1990 U.S. Code Cong. & AD. News 1509 at 1537 In addition, "these requirements [were included] with the intent of according basic due process protections to employees who are asked to execute waivers." Id. at 1537 Clearly, Congress intended that all persons affected would be treated the same, and likewise receive the same benefits and protection afforded by the Act.

The current application of 29 U.S.C.A. 626(f) by the different courts of appeals results in persons in Circuit districts such as the Seventh Circuit being provided with greater protection than similarly situated persons in Circuit districts such as the Fifth Circuit. Therefore, all persons covered by the OWBPA are not being protected equally - contrary to

Congressional intent.

In the instant case, the amount of time (or lack thereof) which Hurdle had prior to signing the General Release and Waiver Agreement is important. It is un-disputed that Hurdle had approximately 30 minutes. The Release itself, in accordance with the provisions of the OWBPA, states that Hurdle had at least 45 days in which to review the agreement.

In discussing the time aspect of individual separation agreements, the Committee stated:

> Moreover, a waiver is not valid unless the individual is given a reasonable period of time in which to review and consider the settlement agreement. An employee who is terminated needs time to recover from the shock of losing a job, especially when that job was held for a long period. The employee needs time to learn about the condition of termination, including any benefits being offered by the employer. Time also is necessary to locate and consult with an attorney if the employee wants to determine what legal rights may exist. In the case of an individual separation agreement, the individual must be given at least 21 days within which to consider the agreement."

Id. at 1538

The Committee further stated that for group termination

programs the employee needs even more time, hence the 45 day requirement for these waivers. Id. at 1539

More importantly, the Committee addressed the issue of a waiver as an affirmative defense. In Subsection D, the Committee stated that, "[a]ll of the criteria discussed above must be met in order for a waiver to be valid." Id. at 1540 Furthermore, the Committee Report states:

> Courts may not consider whether a "knowing and voluntary" waiver has been executed until the party asserting the waiver as a defense first proves that each of the requirements set forth in the bill has been satisfied. These requirements include: (1) the waiver is part of a written agreement; (2) the agreement makes specific reference to rights and claims under the ADEA; (3) the waiver does not apply to rights or claims that may arise after the date of the agreement itself; (4) the waiver is exchanged for valuable consideration in addition to what the individual already is entitled to receive; (5) the individual is given a reasonable time period in which to review and consider the agreement; and, (6) the individual is advised in writing to consult with an attorney.

Id. at 1511

Nowhere in the Committee Report does the Committee state or even imply that an invalid waiver can be ratified. There

is no discussion of ratification in the Majority report.

Wamsley:

The existing opinions in the Fifth Circuit (and to some extent in the Fourth Circuit) are based upon the Court's prior opinion in Wamsley v. Champlin Refining Air & Chemicals, Inc., 11 F.3d 534 (5th Cir. 1993). The Wamsley Court questioned whether the waiver requirements of the OWBPA made the Court's holding in Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir.1991) unsound. The Court stated its belief that nothing in the history of the OWBPA evidenced a congressional intent to disturb the common law principles in which the Grillet holding was founded. Hence the continued application of the Grillet and Wamsley cases.

The principle in question was the common law principle of ratification. The answer to the Fifth Circuit's Wamsley question is found in the Minority Views of the Committee Report at ***B. Current Law***, wherein it is stated that:

> The prohibitions regarding the use of waivers in Title II represent a radical departure from current law and not a clarification, as

> supporters of this bill have suggested. Further, the rationale for this legislation appears to ignore safeguards under current law applicable to the execution of waivers.
>
> So long as waivers meet certain criteria, courts have uniformly upheld their use for any number of causes of action under federal and state law including Title VII. Why, one might then legitimately ask, should waivers under the ADEA justify being treated differently?

S. Rep. No. 101-263, 101st Cong., 2d Sess. 5, *reprinted in* 1990 U.S. Code Cong. & AD. News 1509 at 1565

In accordance with the language in the Minority View, it is quite apparent that the Congressional intent with the addition of section 626(f) was, and is, to treat waivers under the OWBPA differently than they had previously been treated by the judicial system.

To an extent, the Fifth Circuit recognizes that the provisions of the OWBPA place "specific requirements on waivers of age discrimination claims in order for them to be considered knowing and voluntary, this statute is a change from the common law ...." Williams v. Phillips Petroleum Co., 23 F.3d 930 at 936 (5th Cir. 1994)

The question then becomes, why does the Fifth Circuit acknowledge that the OWBPA altered the common law existing prior to the passage of the OWBPA, but still continue to interpret the OWBPA to conform with prior existing common law?

One other commentary to Wamsley, supra. must be made. At page 539 of the Court's opinion the following statement was made:

> We also find that the provisions of section 626(f)(1) support our conclusion that defective waiver agreements are voidable and not void. Section 626(f)(1)(G) expressly provides that for seven days after execution of a waiver agreement an employee may revoke the agreement and that the agreement does not become enforceable until the expiration of the seven day revocation period. If non-compliance with the other subparts of section 626(f)(1) rendered the agreement void, there would be no need for subpart (G).

Wamsley, 11 F.3d at 539

This statement by the Court completely overlooks the point that the OWBPA is providing a seven (7) day out for those employees who have executed a valid release and waiver, and then decide for whatever reason that they wish to re-think their

decision and back out. It is an escape hatch for an employee from the valid release and waiver that he/she knowingly and voluntarily entered.

CONCLUSION

Mr. Hurdle has been deprived of a right which has been extended to other persons similarly situated as he by other District Courts and Courts of Appeals in the United States. Clearly, under the existing case opinions in other Circuits Mr. Hurdle would have been received the protection of 29 U.S.C. 626(f) under the same facts that exist in this case. However, because the Fifth Circuit Court of Appeals has chosen to interpret 29 U.S.C. 626(f) differently than certain other Circuits, Mr. Hurdle is denied the protection given to others.

Accordingly, it is a matter of great national concern which deserves a full review of this Honorable Court. The Court should grant this petition and after due consideration set aside the erroneous judgment of the Fifth Circuit Court of Appeals with directions on how the Circuits should have the same application and interpretation of 29 U.S.C. 626(f), and extend

the same rights of due process and equal protection under the law to all citizens similarly situated as Perrin W. Hurdle.

RESPECTFULLY SUBMITTED, this the _____ day of June, 1997.